

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

OLLIE VINCENT BLAKE,

Defendant-Appellant.

UNPUBLISHED

March 27, 2007

No. 266094

Wayne Circuit Court

LC No. 05-005856-01

Before: Jansen, P.J., and Neff and Hoekstra, JJ.

PER CURIAM.

Defendant was convicted, following a jury trial, of second-degree murder, MCL 750.317, and possession of a firearm during the commission of a felony, MCL 750.227b. The trial court originally sentenced defendant as an habitual offender, second offense, MCL 769.10, to a prison term of 40 to 60 years for the murder conviction, and a consecutive two-year term of imprisonment for the felony-firearm conviction. The court also ordered defendant to pay court costs and attorney fees. After defendant filed a motion for resentencing, the court reduced defendant's sentence for second-degree murder to 30 to 60 years. Defendant appeals as of right. We affirm defendant's convictions, but vacate the trial court's order directing defendant to reimburse the county \$1,310 in attorney fees.

I

Defendant's convictions arise from the shooting death of his girlfriend, Rita "Ray Ray" Jackson. Defendant and Jackson were temporarily lodged with Davis Louis in Louis's apartment above a bar. Defendant and Jackson were selling crack cocaine from the apartment. On May 20, 2005, Jackson was fatally shot in Louis's apartment during a violent argument with defendant.

Although four persons other than Louis, defendant, and Jackson were present in the apartment at the time of the shooting, Louis was the only one who testified at trial. Louis testified that he and Jackson were in the front room of the apartment, and defendant was in his bedroom with his drug suppliers, "Tony" and "Deedee." "Cisco" and "Shirley" were closeted in the second bedroom smoking crack cocaine. Louis testified that defendant came out of the bedroom, grabbed Jackson by her shirt, and angrily shouted something like "I told you about that." Defendant pushed Jackson around the room, and Louis tried to intervene. Louis told Tony to "come get your boy," and told the others that he was going to the bar to use the phone to call

the police. Louis heard a gunshot as he left the apartment, but he did not see the shooting. When Louis returned to the apartment, he saw Jackson lying in a pool of blood on the apartment floor.

Louis testified at trial that he heard defendant say, after the gunshot, “Somebody call 911. I shot her.” However, Louis did not give the police consistent information regarding defendant’s statement. He initially told the police that defendant said, “Call 911, I shot her.” The next day, he told the police that defendant actually said, “Call 911, I accidentally shot her.” Louis admitted that he was drinking and smoking crack cocaine on the day of the shooting, and that intoxication affected his judgment. Louis testified that defendant customarily carried a revolver, and he saw it about half an hour before the shooting. He also stated that Tony and Deedee carried guns, but he did not see their guns on the day of the shooting.

Darakai Burrell, the manager of the bar, testified that he heard scuffling in the apartment when Louis came downstairs to clean the bar. Louis explained the noise by saying his “girlfriend was arguing with her man.” Louis spent about 20 minutes cleaning the bar, and then returned to the apartment. He immediately came downstairs and told Burrell to call the police because a girl had been shot.

II

Defendant argues that the evidence was insufficient to support his conviction. When a defendant challenges the sufficiency of the evidence in a criminal case, this Court considers whether the evidence, viewed in a light most favorable to the prosecution, would permit the trier of fact to find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Robinson*, 475 Mich 1, 5; 715 NW2d 44 (2006). Defendant argues that Louis’s testimony was insufficient to support his conviction because it was speculative that defendant, rather than another individual in the apartment, shot Jackson. We disagree. Louis testified that defendant was physically and verbally combative toward Jackson just before the shooting, and that he resisted Louis’s attempt to intervene. Louis also testified that he heard defendant say that he shot Jackson. Viewed in a light most favorable to the prosecution, this evidence was sufficient to enable the jury to conclude that defendant was the shooter.

Defendant also argues that Louis was not a credible witness because he was intoxicated and gave inconsistent statements to the police, and his testimony concerning the timing and sequence of events conflicted with Burrell’s testimony. Claims involving lack of witness credibility do not establish the insufficiency of the evidence, because this Court defers to the jury’s assessment of the credibility of witnesses. See *People v Lemmon*, 456 Mich 625, 637; 576 NW2d 129 (1998).

Defendant argues, in the alternative, that his conviction is contrary to the great weight of the evidence. This Court applies an abuse of discretion standard of review when reviewing a trial court’s denial of a motion for a new trial on the ground that the verdict was against the great weight of the evidence. *People v Stiller*, 242 Mich App 38, 49; 617 NW2d 697 (2000). In reviewing a claim that a verdict is against the great weight of the evidence, the appropriate test “is whether the evidence preponderates so heavily against the verdict that it would be a miscarriage of justice to allow the verdict to stand.” *People v McCray*, 245 Mich App 631, 637; 630 NW2d 633 (2001). A court may not act as a “thirteenth juror” when deciding a motion for a new trial, and this Court “may not attempt to resolve credibility questions anew.” *People v*

Gadomski, 232 Mich App 24, 28; 592 NW2d 75 (1998). In *Lemmon*, *supra* at 643-644, our Supreme Court recognized only narrow exceptions to the general principle against granting a new trial based on questions of witness credibility, e.g., when witness testimony contradicts indisputable physical facts or laws, when it is patently incredible or defies physical realities, or when it is so inherently implausible that a reasonable juror could not believe it. These circumstances are not present here. As previously indicated, Louis's testimony was sufficient to identify defendant as the person who shot and killed Jackson, and Louis's testimony was not so patently incredible or inherently implausible that it could not be believed. Thus, the trial court did not abuse its discretion in denying defendant's motion for a new trial.

Because defendant's conviction of second-degree murder is supported by sufficient evidence and is not against the great weight of the evidence, it is unnecessary to consider defendant's argument that his murder conviction should be reduced to manslaughter.

III

Defendant argues that the trial court erred by imposing costs of \$600. Defendant did not challenge the imposition of costs at his original sentencing, or in his motion for resentencing. Although defendant orally raised this issue at the resentencing hearing, the trial court declined to consider the issue because it was not briefed, and advised defendant that he could raise the issue in another motion. Defendant did not do so. Under these circumstances, we conclude that this issue is not preserved. Accordingly, our review is limited to plain error affecting defendant's substantial rights. *People v Kimble*, 470 Mich 305, 312; 684 NW2d 689 (2004). A plain error is an error that is clear or obvious. *Id.*

A trial court may require a convicted defendant to pay costs only where the requirement is expressly authorized by statute. *People v Slocum*, 213 Mich App 239, 242; 539 NW2d 572 (1995). Defendant maintains that costs could not properly be assessed under MCL 769.1k, because that statute did not become effective until January 1, 2006, after the date of the offense (and after the date defendant was originally sentenced). As the prosecutor argues, however, costs were also authorized by MCL 769.34(6), which provides that, "[a]s part of the sentence, the court may also order the defendant to pay any combination of a fine, costs, or applicable assessments." The trial court did not identify the statutory authority on which it relied to impose costs. But because there is no indication that the court relied on MCL 769.1k as a basis for imposing costs, and because we conclude that costs were authorized under MCL 769.34(6), we find no basis for concluding that the imposition of costs constituted a clear or obvious error. *Kimble*, *supra* at 312. Accordingly, appellate relief is not warranted.

IV

Defendant also argues that the trial court erred in ordering him to pay attorney fees of \$1,310 without ascertaining whether he was able to do so. Because defendant did not object to the imposition of attorney fees at his original sentencing or raise this issue in his motion for resentencing, we review this issue only for plain error affecting defendant's substantial rights. *People v Dunbar*, 264 Mich App 240, 251; 690 NW2d 476 (2004).

In *Dunbar*, *supra* at 253-254, this Court held that a constitutionally acceptable attorney fee reimbursement program must include five requirements:

First, the program under all circumstances must guarantee the indigent defendant's fundamental right to counsel without cumbersome procedural obstacles designed to determine whether he is entitled to court-appointed representation. Second, the state's decision to impose the burden of repayment must not be made without providing him notice of the contemplated action and a meaningful opportunity to be heard. Third, the entity deciding whether to require repayment must take cognizance of the individual's resources, the other demands on his own and family's finances, and the hardships he or his family will endure if repayment is required. The purpose of this inquiry is to assure repayment is not required as long as he remains indigent. Fourth, the defendant accepting court-appointed counsel cannot be exposed to more severe collection practices than the ordinary civil debtor. Fifth, the indigent defendant ordered to repay his attorney's fees as a condition of work-release, parole, or probation cannot be imprisoned for failing to extinguish his debt as long as his default is attributable to his poverty, not his contumacy.

With respect to the third requirement, the *Dunbar* Court explained that the trial court does not need to make specific findings on the record regarding the defendant's ability to pay, but the court must "provide some indication of consideration, such as noting that it reviewed the financial and employment sections of the defendant's presentence investigation report or, even more generally, a statement that it considered the defendant's ability to pay." *Id.* at 254-255. The reimbursement order should be based on the defendant's foreseeable ability to pay, and his capacity for future earnings, not only his present ability to pay. *Id.* at 255.

Here, the trial court failed to indicate that it considered defendant's ability to repay his attorney fees, and in light of the fact that defendant received appointed trial and appellate counsel in this case, it is apparent that he does not have the ability to pay. Accordingly, we vacate the order requiring defendant to reimburse the county \$1,310 in attorney fees.

Affirmed in part, vacated in part.

/s/ Kathleen Jansen
/s/ Janet T. Neff
/s/ Joel P. Hoekstra